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U.S. Department of Justice



United States Attorney
Southern District of New York

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April 11, 2024

BY ECF

Hon. John G. Koeltl
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *Kunstler et al. v. Central Intelligence Agency et al.*, No. 22 Civ. 6913 (JGK)

Dear Judge Koeltl:

We write respectfully on behalf of the Central Intelligence Agency (“CIA” or the “Government”), in connection with its anticipated motion to dismiss the remaining claim in this case under the state secrets privilege, (i) to seek leave to submit a supplemental memorandum of law *ex parte* and *in camera* (in addition to the Government’s public unclassified memorandum of law) to permit discussion of classified national security information that is necessary to directly address the issues that will be before the Court on the motion, and (ii) to increase the combined word limit for the Government’s memoranda of law, as set forth in Section II.D of this Court’s Individual Practices, to 11,000 words.

We expect that the Government’s anticipated motion to dismiss will be supported by two declarations from CIA Director William J. Burns: a public, unclassified declaration and a classified declaration that will be submitted to the Court for its review *ex parte* and *in camera*. The Government respectfully requests approval to submit a classified supplemental memorandum of law for review *ex parte* and *in camera*. This memorandum will discuss the classified information in Director Burns’s classified declaration as it relates to two critical points in the Court’s analysis of the CIA’s assertion of the state secrets privilege: “the validity of the privilege”—that is, whether “there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security”—and “the effect of an invocation of the privilege, in light of the exclusion of the evidence, on the plaintiff’s claim or defendant’s defense,” which “may be so drastic as to require dismissal” of the case. *Doe v. CIA*, 576 F.3d 95, 104 (2d Cir. 2009) (internal quotation marks omitted).

The Second Circuit and other courts in this District have permitted the Government to submit classified briefing in civil cases where necessary to fully address the relevant facts and law. *See, e.g., N.Y. Times v. DOJ*, No. 13-422 (2d Cir.), ECF Nos. 122, 149 (permitting government to file *ex parte*, for *in camera* review, classified inserts to the government’s brief on appeal and a classified submission addressing questions posed at oral argument); *In re Terrorist Attacks*, No. 03 MDL 1570 (GBD) (SN) (S.D.N.Y.), ECF No. 6105 (authorizing government to submit classified memorandum of law along with unclassified memorandum of law in support of assertion of state secrets privilege).

Here, the Government respectfully seeks leave to submit memoranda of law collectively totaling no more than 11,000 words, consisting of: (1) an unclassified memorandum filed on the public record; and (2) a classified supplemental memorandum that will be submitted to the Court *ex parte* and *in camera* and will be limited to those matters that can be directly addressed only by reference to classified information. The Government also respectfully requests that the Court expand the word limit set forth in its Individual Practices—by 4,000 words—to allow the Government to fully address the factual matters in the classified declaration, which cannot be addressed on the public record.

Plaintiffs' counsel has advised the undersigned that they do not object to the word limit extension, but they object to the Government's submission of an *ex parte* memorandum of law that seeks some form of relief without being shown the memorandum.

I thank the Court for its consideration of this request.

Respectfully,

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cc: All parties (by ECF)

An application is granted. The word limit extension is unopposed and the Plaintiff may have a smaller word limit of 11,000. The application to file a memorandum ex parte under seal because it contains classified information is granted without prejudice to any subsequent ruling by the Court after reviewing the ex parte submissions.

so ordered

*4/10/24 DJS/Kelso
n.s.d.s.*